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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Nondiscrimination in the Distribution of Interactive Television Services Over Cable	))	CS Docket No. 01-7

REPLY COMMENTS OF COMCAST CORPORATION

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REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") hereby replies to the comments submitted by other interested parties in response to the Commission's Notice of Inquiry ("Notice") on interactive television ("ITV").[1] Taken as a whole, those comments provide abundant support for the positions set forth in Comcast's initial comments. They reveal, in particular, that the development of ITV services is both embryonic and extraordinarily complex. Numerous and diverse companies are actively exploring a wide variety of potential services in an atmosphere of competition, innovation, experimentation, and risk. There is no "problem" which FCC action is needed to "fix."

I. INTRODUCTION AND SUMMARY

The first-round comments confirm that the Commission has no basis to contemplate regulation of ITV services delivered over cable facilities. The facts do not justify regulation. Neither does the law.

Even the proponents of ITV regulation are compelled to admit that ITV services are in an early stage of evolution. ITV services are being developed in an environment whose primary

[1] *Nondiscrimination in the Distribution of Interactive Television Over Cable*, CS Docket No. 01-7, FCC 01-15 (Jan. 18, 2001) ("*Notice*").

characteristics are dynamism, multiple firm entry, investment, and uncertainty. The record clearly shows that ITV services present innumerable technical and commercial complexities that have yet to be worked through. Consumer interest in various forms of ITV offerings is also unknown. Business models necessarily remain in flux.

The record also provides abundant evidence that the ITV marketplace is working appropriately. Proponents of ITV regulation cite no concrete evidence of anticompetitive conduct by anyone. Rather, they just offer *speculation* about the *possibility* of *future* harms. This is no basis for regulation, especially when actual developments in the marketplace show that multiple and varied entities are successfully forging agreements with nonaffiliated entities to cooperate in developing and deploying ITV services. And, there is absolutely no reason why the development of this market should be skewed to advantage those who seek to game the regulatory process, in an effort to enhance the already considerable negotiating leverage of successful businesses like Disney, Viacom, and Earthlink.

The comments also confirm that the FCC has no firm jurisdictional claim over cable-delivered ITV services. The Notice itself articulates no clear basis for the imposition of any particular regulatory requirements on cable's ITV services. Advocates for government regulation either ignore the jurisdictional issue or grasp at inapposite legal straws.

In short, this is a proceeding without a purpose, and the proposed imposition of regulatory requirements and prohibitions is a cure without a disease. Comcast therefore suggests that the chilling regulatory overhang of the market be ended by terminating the inquiry without further delay.

II. ITV SERVICES ARE IN THEIR INFANCY.

The Commission has properly decided to tread lightly when dealing with nascent markets. Time and again, the Commission has stressed the value of "regulatory restraint" when

dealing with a "dynamic and evolving market."[2] This approach is fully consistent with economic theory and economic literature.[3] Restraint is especially appropriate in the case of ITV services, as virtually every party that filed first-round comments agrees that ITV services are nascent.

People relate to their televisions differently than they used to, and this relationship will change much more significantly in the future. Already, the number of channel choices for many viewers has expanded greatly, especially for subscribers to DBS and digital cable services. Electronic program guides have emerged to help viewers sort through these choices, gather more information about them, remind viewers of shows they have selected for later viewing, and limit the shows their children may watch. Captioning and Second Audio Program channels enrich the viewing and listening experience.

Yet, despite the considerable value of these features and tools, today's offerings are rudimentary compared to those now being developed under the rubric of "interactive television." Consumers will be able to use their televisions in new ways, and view the programming that interests them at times of the viewer's choosing. The range of potential services includes: digital storage and retrieval, with easy recording of favorite shows regardless of time or channel; video-on-demand, with VCR functionalities; access to storehouses of information about actors, directors, and story lines; new forms of home shopping; messaging; and games. All of these capabilities, and many more, are part of the promise -- or, more precisely, the *potential* -- of ITV.

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[2] *E.g.*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696, 3840 (1999); *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans on a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd. 2398, 2436 (1999)("need to be particularly careful" given "nascent nature" of the market); "*Broadband Today*," FCC Cable Services Bureau, at 45 (1999).

[3] *See* Comments of NCTA (Attachments A & B); Comments of AT&T at 33 n.112 (collecting sources). It is noteworthy that *all* of the economic analysis submitted in the first-round comments supports a posture of regulatory restraint.

The development of ITV services is fraught with uncertainty and risk. Even the most aggressive proponents of regulation are compelled to acknowledge that ITV services are far from mature. The Vertically Integrated Broadcasters[4] (at 3) refer to the "early stages" of ITV. ALTV (at 3) sees ITV as "a new and evolving technology." MSTV (at 3, 5) admits that ITV services are in an "embryonic, developmental stage" and that "no one can at this time predict how ITV services will develop and be used in the future . . . ." Consumers Union et al. (at 11) express the same sentiment in virtually the same words: "No one can accurately predict how ITV will develop." Gemstar-TV Guide (at 2) describes the ITV business as "fluid and dynamic." PBS/APTS (at 2) finds the market to be "rapidly evolving," and TiVo (at 1, 2) describes it as "rapidly developing" and "nascent."

No one claims otherwise. Thus, one major issue in this proceeding is whether the Commission should abandon its traditional reluctance to regulate nascent services. Comcast respectfully suggests that the Commission should not do so. Indeed, the case for restraint is especially powerful where, as here, (1) no anticompetitive conduct has been alleged (much less proven), (2) the services are embryonic and are developing rapidly and competitively, and (3) the statutory basis for regulatory action is so tenuous.

III. ITV SERVICES ARE DEVELOPING APPROPRIATELY.

No one has presented any credible evidence of any marketplace misconduct that would justify government intervention regarding ITV services. Indeed, the record affirmatively demonstrates that ITV services are developing appropriately, and can best develop in the absence of the inevitable costs and distortions that result from regulation.

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[4] This is the term used herein to refer to the comments filed by The Walt Disney Company, Viacom, USA Networks, Inc., and Univision Communications Inc., all of which enjoy government-granted licenses for cost-free and exclusive use of the public's airwaves. These parties seek to force a form of vertical disintegration on others, even as they expand their own horizontal and vertical reach. *See* Section V, *infra.*

As is clear from the initial comments of Comcast, AOL/Time Warner, AT&T, Canal+, Charter, Cablevision, DIRECTV, Golf Channel et al., National Football League, OpenTV, and others, virtually every company that hopes to participate in the development or delivery of ITV services is busily trying to assess technology, develop business models, forge alliances, ascertain consumer desires (and willingness to pay!), devise marketing strategies, and so on. Numerous purveyors of content, hardware, and enabling technologies -- as well as service providers -- are investing substantial resources. Ideas are being tried, revised, tried again, discarded, and revived in rapid succession. Innumerable commercial relationships are developing, including many that are inconsistent with the theoretical "incentives" as imagined by proponents of regulation. This is normal, healthy behavior in an area of commercial endeavor that is robustly competitive, innovative, and fraught with risk.

At this juncture, there is no evidence of any "discrimination" of a kind that harms competition. Those who favor regulation present no evidence of marketplace abuses. They merely invoke "concerns" that cable operators "might" misbehave and ask the Commission to intervene now to prevent what they perceive to be the "potential" for anticompetitive conduct. Thus, just weeks after the U.S. Court of Appeals struck down FCC rules for relying on speculation and conjecture,[5] proponents of ITV regulation ask the Commission to climb still further out on the limb of speculation and conjecture. Chairman Powell has explicitly (and wisely) repudiated this approach to regulation.[6] The Commission as a whole should do so as well.

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[5] *Time Warner Entertainment v. United States*, No. 94-1035 (D.C. Cir. Mar. 2, 2001) ("*Time Warner II*").

[6] "Powell Questions Future Role of Over-the-Air TV," *Communications Daily*, at 2 (Apr. 6, 2001) ("I am a very big skeptic about early government intervention . . . . I certainly wouldn't support government intervention [concerning ITV services] at this minute . . . . *That's often when government is at its worst, when it's trying to regulate phantoms*") (emphasis added); "Powell Takes Wait-and-See Stance on ITV," *Multichannel News*, at 47 (Apr. 9, 2001) ("I . . . prefer to wait for clear evidence of abuse -- demonstrable -- or clear and persistent trends that you can identify as something to take an action on").

Speculation that cable companies will behave in an anticompetitive fashion necessarily rests on the premise that cable is likely to be the "superior platform" (see Notice at ¶ 3) with "substantial advantages" (*id.*) over other media as a means of delivering ITV services.[7] Such conjecture provides no basis for regulation. Moreover, the growing success of other delivery media cannot be ignored.

Satellite companies, in particular, offer genuine alternatives -- just as they do in the delivery of conventional multichannel video programming services. Echostar (at 1, 2) indicates that it is already offering a form of ITV services and "soon plans to launch its first Ka/Ku-band satellite, which will allow interactive broadband services." DirecTV has contracted with The Weather Channel to distribute program enhancements to the latter's programming, and "they have also developed a separate 'virtual' channel."[8] OpenTV (at 9-10) describes evidence that satellite subscribership is growing relative to cable and (at 12-14) persuasively argues that any alleged advantages of the cable platform will spur increased investment and innovation on the part of rival platforms. AT&T (at 14-19) presents an abundance of evidence that satellite is well positioned to provide ITV services and that satellite companies are in fact well ahead of cable in providing ITV services abroad.

The Vertically Integrated Broadcasters (at 14) claim that cable has the advantage of an "enormous national footprint" in providing ITV services. This is absurd. The plain truth is that it is *DBS providers* that have national footprints -- as do the Disney and Viacom-owned broadcast networks, through their affiliate webs. No cable operator has anything close to national coverage. Notions to the contrary mistakenly treat a diverse industry, with numerous

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[7] Actually, not all advocates of ITV regulation would single out cable. TiVo (at 3-4), for instance, seeks to treat all MVPDs equally, without special emphasis on cable or exemption for satellites, and posits the peculiar theory that every distributor of multi-channel services is a monopolist vis-à-vis those who choose to use its services. Consumers Union et al. (at 11-12) would regulate not just cable but also DBS providers and even programmers.
[8] Comments of The Golf Channel et al. at 10.

discrete participants, as if it were all owned by a single monolith, which of course it is not. Any given cable company, of course, is limited to the discrete geographical region where it has obtained the requisite franchise authority and has made the investment necessary to buy or build facilities.[9]

Cable's advantage, as hypothesized by the Notice (at ¶ 20), lies in its supposed superior bandwidth for upstream (customer-initiated) signals. But, as Canal+ explains (at 2), "current ITV applications do not require high upstream bandwidth." Moreover, "there is widespread evidence, particularly in Europe, that ITV services are being deployed without a high-speed upstream connection."[10] This is confirmed by Gemstar (at 4), which says it will "probably us[e] a two-way paging frequency[] that enables the consumer to communicate with Gemstar and its ITV partners."

Thus, all signs point to the emergence of strong facilities-based competition. Cable and satellite will surely compete in the delivery of ITV services. Telephone (DSL) and Wireless distribution platforms may add still more competition.

Moreover, the real-world behavior of cable companies with regard to ITV services and technologies does not reflect the possession of market power, much less the abuse of such power. Indeed, in the few weeks since first-round comments were filed, many contracts and other arrangements have been announced that reflect a healthy, properly functioning marketplace. Comcast, for example, has signed a 20-year agreement with Gemstar that will make Gemstar's interactive program available to a substantial majority of Comcast's digital cable subscribers. "Gemstar Guides Comcast Home," *Multichannel News*, at 2 (Mar. 26, 2001). This contract is with a nonaffiliate, which runs contrary to the theoretical "incentive" that Comcast would have

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[9] Until it was struck down in *Time Warner II*, the Commission's rule barred any one cable operator from serving -- or having attributable interests in -- systems serving more than 30 percent of MVPD households.
[10] Comments of Canal+ at 3.

to discriminate in favor of Worldgate, in which Comcast is an investor.[11] Moreover, as noted by The Golf Channel *et al.* (at 17), Comcast has launched interactive services using Wink,[12] despite having invested in RespondTV. Comcast has also entered into a strategic volume purchase agreement for video-on-demand systems from Concurrent,[13] notwithstanding Comcast's equity stake in Concurrent's rival, SeaChange.[14] And Comcast, like other cable multiple-system operators, has negotiated mutually satisfactory agreements that encompass ITV matters with non-MVPD-owned content providers.

All of these developments reflect a marketplace that is functioning properly. There is no "problem" that government regulations are needed to "fix." This being the case, the consequences of government regulations that attempt to govern ITV negotiations will be a needless complication at best and will distort outcomes and/or diminish investment at worst.

IV. THE PROPONENTS OF ITV REGULATION HAVE NOT PRESENTED A CREDIBLE LEGAL JUSTIFICATION.

The Notice identified no credible jurisdictional basis for FCC regulation of ITV services. The proponents of regulation have done nothing to remedy that deficiency.

Several advocates of ITV regulation do not even trouble to mention a statutory basis upon which the regulations they favor could lawfully be adopted. Gemstar, for example, does not even mention the Communications Act, nor any other statute that the Commission has power to

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[11] Indeed, contrary to the theories of Disney, Consumers Union, and others, Worldgate has recently announced downsizing plans, notwithstanding the company's affiliation with Adelphia, Charter, Comcast, and Cox. "WorldGate Announces Workforce Reduction," Press Release of WorldGate Communications, Inc. (Apr. 4, 2001), http://biz.yahoo.com/bw/010404/2263.html (viewed Apr. 5, 2001).

[12] *See* "Comcast Launches its First Wink-Enabled Enhanced TV Service to Digital Cable Customers in Virginia," Press Release of Wink Communications, Inc. (Mar. 7, 2001), http://biz.yahoo.com/prnews/010307/sfw064.html (viewed Mar. 8, 2001).

[13] *CableFAX Daily*, at 1 (Apr. 4, 2001).

[14] "Comcast Inks Big VOD Deal," *Multichannel News* at 10 (Apr. 9, 2001).

implement. TiVo, likewise, pleads for government regulation, but makes no effort whatsoever to identify a statutory basis for its proposal.

Other proponents of regulation are scarcely more credible. MSTV (at 9-11) contends the FCC "has ample authority to regulate ITV" because Sections 1 and 2 of the Communications Act grant it "broad discretion to address new technologies as they evolve." These provisions, however, merely specify the purposes and application of the Act; they do not give the Commission any particular authority -- much less *carte blanche* to adopt any and all regulations that have some connection to communications by wire or radio. MSTV also errs (at 8) in invoking the statutory provisions for program access, open video systems, and the Satellite Home Viewer Improvement Act. Each of these provisions must be read as Congress wrote it -- not as an unbridled authorization to impose arguably similar requirements to situations that are unquestionably different from those covered by these carefully-drawn provisions.

The remaining proponents of regulation offer a curious *mélange* of jurisdictional theories, none of which are availing. Earthlink (*passim*) recycles the same confused analysis it previously proffered in the forced access docket, about which little needs be said other than that this line of argument was fully considered and explicitly rejected in the Commission's April 1998 Report to Congress.[15] SBC and BellSouth (at 2-5) likewise echo the legal analysis they presented in the forced access proceeding, which Comcast has already addressed at length in that docket.[16] ALTV (at 17-18) invokes Section 616, which required the adoption of regulations *by 1993* to address problems perceived to exist *in 1992*; this provision provides no new authority to address new services, especially given the now-vastly increased competitiveness of the MVPD market.[17]

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[15] *See In the Matter of Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11516-11527 (1998) ("*Report to Congress*").
[16] *See* Reply Comments of Comcast Corporation, CC Docket No. 00-185, at 6-11 (Jan. 10, 2001); *see also* Comments of Comcast Corporation, CC Docket No. 00-185, at 11-31 (Dec. 1, 2000).
[17] *See Time Warner II*, slip op. at 14 (faulting the Commission for failing to take into account "substantial changes" in competitiveness of MVPD market over a much shorter period).

Consumers Union et al. (at 8) assert that the Commission is free to regulate, "in a manner consistent with the goals of the Communications Act," so long as is does not contravene a specific restriction; this is, of course, completely wrong and it ignores such specific restrictions as Sections 621(c) and 624(f) of the Communications Act.[18] Echostar (at 2-4) would invoke the "essential facilities doctrine," even though the factual predicates for application of that theory are inapplicable and Echostar never explains why the Justice Department and the Federal Trade Commission cannot be trusted to enforce the antitrust laws. NAB (at 14) refrains from claiming that Sections 616 and 628 of the Communications Act are directly applicable but nonetheless proposes that they should be used as "model[s]" or "template[s]." The Vertically Integrated Broadcasters (at 22) call for "ITV-specific safeguards analogous to those currently in place" under Sections 201, 202, 251, 252, 256, and 257, but they provide no statutory analysis to support such an approach; they also ignore the explicit limitations imposed on the FCC by Sections 621(c) and 624(f).

Moreover, very few of the proponents of regulation come to terms with the judicial decisions discussed at length in the filings of Comcast, other cable companies, and NCTA. These judicial rulings counsel strongly against regulatory initiatives to address hypothetical problems in nonexistent markets, even where statutory authority is stronger than in the present case.

Just as varied as the jurisdictional theories are the specific regulatory proposals advanced by those who believe ITV can be better managed by the government than by a competitive marketplace. Some of these proposals go further than the (already unjustified) regulations contemplated by the Notice. The Vertically Integrated Broadcasters (at 17 & n.43) propose to require cable operators to collect revenues only from subscribers, through flat subscription fees,

[18] The first of these provisions explicitly bars the regulation of cable companies as common carriers by reason of their provision of cable services. The second prohibits the imposition of requirements regarding the provision or content of cable services, *except as expressly provided in Title VI of the Communications Act.*

and never from content providers or as part of an ITV-based transaction. Various parties seek to relitigate the still-pending complaint regarding non-program-related material carried in broadcasters' vertical blanking intervals. Others seek to impose requirements relating to the provision of set-top boxes. And at least one group of parties (Consumers Union et al. at 11) purports to seek merely "a simple edict not to discriminate," although in truth this would quickly lead to detailed FCC involvement in the relationships between and among program providers, T-commerce enablers, developers of middleware operating systems, infrastructure hardware and software suppliers, program guides, conditional access vendors, set-top box manufacturers, interactive game vendors, datacasting and multicasting companies, and so on.

This hodge-podge of jurisdictional arguments and regulatory proposals unintentionally reveals what the proponents of regulation are trying to obscure. The fact is, Congress has *not* authorized the regulation of ITV services. Instead, it has adopted certain specific requirements and prohibitions pertaining to certain services in certain circumstances -- and refrained from adopting others. Moreover, Congress has increasingly sought to rely more on competition than regulation to provide market discipline and consumer protection, and cable operators and their customers know well that this course has brought about precisely the results that were intended. From coast to coast, Americans today enjoy competitive choice in multi-channel video services. The same will be true as ITV services are increasingly provided by cable, satellite, broadcast, and other program providers.

V. THE COMMISSION SHOULD NOT PROVIDE ARTIFICIAL ADVANTAGES TO COMPANIES THAT DO NOT NEED THEM, ESPECIALLY WHEN THEY CONTRADICT THEIR OWN PREVIOUSLY EXPRESSED POSITIONS.

The great majority of those who wish to regulate ITV services delivered via cable are broadcasters or their representatives (*e.g.*, ALTV, NAB, MSTV, the Vertically Integrated Broadcasters). What the members of ALTV, MSTV and NAB -- as well as the Vertically Integrated Broadcasters -- all have in common (besides their desire to impose new burdens of cable companies) is that they receive free use of an extremely valuable public asset as a means of

delivering the programs of their choosing. Every television broadcast licensee has received, *gratis*, exclusive use of six megahertz of spectrum at frequencies that are especially versatile and valuable. Moreover, each licensee is being "loaned" a *second* six-megahertz channel during the "transition" to DTV, a transition which apparently is going to endure for a considerable period.

Cable operators, by contrast, receive no government handouts and instead pay for the privilege of serving each community. Comcast has not complained of the DTV spectrum giveaway, nor has it sought relief from local franchise fee requirements. In assessing the broadcasters' proposals, however, it is fair to ask the Commission to bear in mind which parties receive the rights to billions of dollars worth of free spectrum, and which parties instead pay billions of dollars in franchise fees.

The plain truth is that the cable business is competitive, capital-intensive, and risky. Comcast builds and upgrades its facilities using privately raised capital. It competes intensely with DBS (as well as wireline competitors like Knology and RCN) for multi-channel video subscribers and intensely with telephone companies for high-speed Internet services (and to some degree video services as well). Additional competition is developing in both the video and the Internet businesses, for example, through fixed wireless services.

Notwithstanding growing competitive pressures, Comcast is committing capital to the development and deployment of new services. These services must deliver to consumers an experience for which Comcast is prepared to be held accountable in the marketplace. Except as *specifically* provided by statute, or by FCC rules that are firmly grounded in the statute, the FCC has no basis to interfere in the decisions of Comcast or of any other MVPD regarding the planning, characteristics, deployment, business relationships, or prices associated with its ITV services.

If the Vertically Integrated Broadcasters and the members of NAB, ALTV, etc. want to dictate the direction and capabilities of a cable-based ITV platform, they certainly have the

capital, the know-how, and the opportunity to invest in such a platform. There is simply no excuse for them to try to use Commission processes to gain leverage in ordinary commercial negotiations in a competitive market.

Particularly troubling is the pleading filed by the most strenuous proponents of ITV regulation, a group of vertically integrated broadcasters led by Disney and Viacom. As pleaders for additional government-bestowed advantages, neither is deserving. Nor, in this case at least, is either credible.

Disney has been the most vigorous proponent of ITV regulation over the past year, and the arguments Disney is presenting now are little changed from those it previously presented in the context of the then-pending merger application of AOL and Time Warner. Notably, when Disney was first presenting these arguments, the Chairman and Commissioners inquired whether Disney's concerns were merger-specific or were of broad industry applicability. Disney's response was unequivocal: "Our concerns are tightly focused on *this* proposed transaction, *this* unique aggregation of market power and the history of anticompetitive practices by *this* group of companies . . . . It is *this* merger, *these* companies, and *these* past practices that are the focus of our concern."[19] Yet now, less than one year after these unambiguous assurances to the Commission, Disney is leading the charge for rules that are *not* tightly focused, do *not* address "unique" marketplace characteristics, and do *not* relate to the past practices of any company.

Astonishingly, Disney provides no explanation for this about-face. The pleading is devoid of any clue as to why what it previously called a "tightly-focused," merger-specific issue has now suddenly become a concern sufficient to justify regulation of all "vertically integrated cable operators."[20] The only apparent explanation is that Disney's desire for government-

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[19] Letter from Preston R. Padden, Disney, to Chairman William E. Kennard, FCC, CS Docket No. 00-30, at 1 (Aug. 1, 2000)(all emphasis in original).
[20] Comments of The Vertically Integrated Broadcasters at 13.

conferred regulatory leverage in commercial negotiations outweighs considerations of principle or consistency.

This would be bad public policy in all events. But Disney is especially ill-suited to seek such government-conferred advantages. As the Commission is aware, Disney's myriad assets include: the ABC Network; multiple owned-and-operated TV broadcast stations; the Disney Channel, ESPN, ToonDisney and SoapNet (as well as stakes in A&E, The History Channel, and E! Entertainment Television); 50 radio stations; theme parks and hotels; a line of cruise ships; "the world's largest publisher of children's books and magazines;" retailing operations; movie studios; and a "collection of Internet sites [that] collectively ranks sixth in total usage on the entire Internet."[21] Disney has proven time and time again that it has all the leverage it needs -- thanks to retransmission consent and the ability to tie its products (to the detriment of cable customers) -- to fully exploit its considerable vertical and horizontal integration. Disney needs no additional "help" from the Commission.

Disney's lead partner in the effort to regulate cable companies' ITV service is Viacom. Viacom, too, has a formidable commercial presence, encompassing: many program services (e.g., MTV, Showtime, Nickelodeon, VH1, The Movie Channel and partial ownership of Comedy Central); two television networks (CBS and UPN); 37 owned- and-operated stations (plus two more operated pursuant to local marketing agreements); various television production and syndication companies (e.g., King World); 184 radio stations (including six in New York and seven each in Los Angeles, Chicago, and San Francisco); a movie studio (Paramount); five theme parks; a majority interest in Blockbuster Video; several publishing houses (e.g., Simon & Schuster and Scribner); and various Internet businesses (*e.g.*, Hollywood.com).[22] Viacom, like

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[21] M. Eisner, "Letter to Shareholders," The Walt Disney Company, *Annual Report 2000*, at 3-8 (Nov. 30, 2000).
[22] Viacom Inc., Securities and Exchange Commission Form 10-K, Annual Report for period ending 12/31/00, at 2-3, 9-10, 13-14 (filed Mar. 28, 2001).

Disney, refrains from explaining why its massive assets should be supplemented -- for purposes of negotiations with much smaller entities -- by government-conferred negotiating advantages.

In other contexts, Viacom has adopted a more statesmanlike posture than the one it presents here. In prior pleadings with the Commission, Viacom has insisted that the Commission not regulate in the absence of sufficient evidence of a genuine problem.[23] It has insisted that the Commission not act inconsistently with the plain language of the Communications Act.[24] It has stressed the value of "exclusivity" in creating the conditions needed to launch costly and risky new services.[25] It has faulted proponents of new rules for offering no evidence of need "other than to recite the Commission's own precautionary admonition concerning possible future, but as yet inchoate, developments . . . ."[26] It has criticized as "gross over-reaching" proposals from parties that sought to use Commission leverage to strengthen their position in commercial negotiations.[27] *All* of these prior statements are inconsistent with the Vertically Integrated Broadcasters' position in this proceeding.

Of course, the credibility problems of the leading proponents of regulation -- while serious -- are not the main reason why the Commission should practice regulatory restraint. The *best* reasons for not imposing ITV regulations on cable are that the market is too nascent and complex, that cable has no market power to abuse, and that the Commission lacks statutory authority.

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[23] Reply Comments of Viacom Inc., CD Docket No. 97-248, at 2, 8 (Feb. 23, 1998).
[24] *Id.* at 2, 4.
[25] *Id.* at 6, 7.
[26] Reply Comments of Viacom Inc., RM Docket No. 9097, at 2-3 (July 17, 1997).
[27] Opposition to Petition for Reconsideration, MM Docket No. 92-265, at 1-3 (July 14, 1993).

VI. CONCLUSION

The first-round comments lend considerable support to the factual, legal, and analytical perspectives presented in Comcast's initial comments. Comcast respectfully suggests that the Commission terminate this proceeding without further delay and that the Commission monitor ITV developments without any implicit threat of government regulation.

Respectfully Submitted,

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